Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors and other applications

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING-UP) PETITION NO D2-28-187-90 (CONSOLIDATED WITH COMPANIES (WINDING UP) PETITION NOS D2-28-192-90, D2-28-197-90 AND D2-28-202-90)
SITI NORMA YAAKOB J
9 JUNE 1994

Companies and Corporations — *Winding up — Just and equitable rule — Application to wind up family companies — Whether quasi-partnership — Whether Ebrahimi's case lays down test when 'just and equitable' provision can be applied — Whether court should order voluntary winding up instead — Companies Act 1965 s 218(1)(i)*

Companies and Corporations — *Winding up — Just and equitable rule — Twelve years since awareness of irregularities in management of companies — Whether consented to irregularities — Whether delay in bringing action*

Kuok Sr and the members of his immediate family had family companies in Singapore and Malaysia but because of differences between Kuok Sr and his brother, Kuok Sr and the members of his family withdrew from and sold their holdings in those companies. Proceeds of the sale were deposited into a common pool fund ('the fund') for the purpose of reinvesting the moneys jointly. The fund was managed by Kuok Sr's youngest son, the second respondent.

The first respondent, Tien Ik Enterprise Sdn Bhd, was the first of an array of companies ('the family companies') set up in 1978 as vehicles to further the family fortune. The petitioner, Woodsville Sdn Bhd, was a nominee company of Peter, the eldest son of Kuok Sr and was also a shareholder of the first respondent. As it happens, there was dissatisfaction amongst the siblings as to the second respondent's management of the fund and the rift further widened after Kouk Sr's death in 1979. In 1986, the second respondent withdrew from the management of the fund and also relinquished all executive functions in the first respondent. In 1987, Peter took over the reins of managing the first respondent and it was decided that the fund be distributed amongst the siblings. In the process of doing so, Peter discovered that there had been certain irregularities in the management of some of the family companies.

Following Peter's persistent probings, the second to fifth respondents, as the majority shareholders and directors of the first respondent, passed a number of resolutions, all aimed at excluding Peter from the management of the first respondent as well as the other family companies by removing him as the chairman and executive director of the first respondent as well as the director of the other family companies.

Despite a court order that the resolutions by the second to fifth respondents were invalid, the second to fifth respondents continued to attempt to oust Peter from the management of the first respondent. Following the last attempt to do so, Peter filed a winding up petition under s 218(1)(i) of the Companies Act 1965 ('the Act') for the winding up of the first respondent on just and equitable grounds.

Held, ordering that the first respondent be wound up:

(1) *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; [1972] 2 All ER 492; [1972] 2 WLR 1289 merely sets out the circumstances under which equitable considerations can be adopted and does not lay down any test when the 'just and equitable' provision can be applied.

(2) The second respondent only had authority to sell Peter's shares in the Singapore and Malaysian companies and not to invest the proceeds of sale in companies set up for that purpose nor did he have the power to incorporate the first respondent and manage it. However, it was now too late for Peter to object to the manner in which his investments had been reinvested further through the formation of the first respondent and the other family companies particularly when he holds shares in those companies.

(3) From the nature of the formation and set up of the first respondent, the obligations of the children of Kuok Sr as members went beyond that laid down by the memorandum and articles of association. The first respondent was definitely a family association made up of the children and grandson of Kuok Sr and it was their personalities as such that singled out the first respondent as a company where the members' relationship was akin to that of partners.

(4) Although 12 years had passed since the time Peter was aware of the irregularities created by the second respondent, there was no delay given the special circumstances of this case and the position Peter was placed in. On the peculiar facts of this case, there was no question of Peter having consented to the second respondent's irregular conduct.

(5) There was justification for the court to wind up the first respondent under the just and equitable provision of s 218(1)(i) of the Act as:

   (i) the mutual trust and underlying confidence, which formed the basis of the association, had ceased to exist altogether;

   (ii) the present state of affairs of the first respondent could not possibly have been contemplated by Kuok Sr or the parties to this petition when they agreed to pool their resources and become members of the first respondent;

   (iii) age was running against Peter and the second to fourth respondents as Peter is now 63 and he should not have to

wait for his money forever. The first respondent is solvent, has no creditors but it has never declared any dividends; and

(iv) all the shareholders, without exception, had declared their intention to have the first respondent wound up from as long ago as 1987, but no steps had been taken until now to fulfil that common intention.

(6) There was no justification in ordering a voluntary winding up as opposed to a compulsory one as this family dispute would not reach any finality if left in the hands of the shareholders. On the facts of this case, it was only just and equitable that a court-appointed liquidator be directed to take over the affairs of the first respondent.

[Bahasa Malaysia summary

Kuok Sr dan ahli-ahli keluarga terdekatnya mempunyai beberapa buah syarikat kepunyaan keluarga di Singapura and Malaysia tetapi disebabkan oleh perselisihan di antara Kuok Sr dan abangnya, Kuok Sr dan ahli-ahli keluarganya telah menarik keluar daripada dan telah menjual pemegangan mereka di dalam syarikat tersebut. Hasil daripada jualan itu telah diletakkan ke dalam suatu tabung bersama ('tabung itu') supaya wang itu boleh dilaburkan semula bersama. Tabung itu diuruskan oleh anak bongsu Kuok Sr, responden kedua.

Responden pertama, Tien Ik Enterprise Sdn Bhd, merupakan syarikat pertama di dalam suatu kumpulan syarikat ('syarikat keluarga itu') yang telah diperbadankan di dalam tahun 1978 untuk menambahkan rezeki keluarga itu. Pempetisyen, Woodsville Sdn Bhd, merupakan syarikat penerima namaan Peter, anak sulung Kuok Sr dan juga merupakan pemegang saham responden pertama. Sebagaimana yang berlaku, terdapat rasa tidak puas hati dikalangan adik beradik itu mengenai pengurusan tabung itu oleh responden kedua dan perselisihan itu menjadi lebih teruk selepas kematian Kouk Sr dalam tahun 1979. Dalam tahun 1986, responden kedua telah menarik keluar daripada pengurusan tabung itu dan juga telah melepaskan kesemua fungsi eksekutif di dalam responden pertama. Di dalam tahun 1987, Peter telah mengambil alih pengurusan responden pertama dan telah diputuskan supaya wang di dalam tabung itu dibahagikan di antara adik-beradik itu. Dalam proses membuat sedemikian, Peter telah mendapati bahawa terdapat beberapa luar aturan tertentu di dalam pengurusan beberapa syarikat keluarga itu.

Berikutan penyiasatan Peter yang berterusan, responden kedua ke responden kelima, sebagai pemegang saham dan pengarah responden pertama, telah meluluskan beberapa resolusi, kesemuanya bertujuan untuk menghalang Peter daripada mengurus responden pertama dan juga syarikat keluarga yang lain dengan menyingkirkannya sebagai pengerusi dan pengarah eksekutif responden pertama dan juga sebagai pengarah syarikat keluarga yang lain.

Walaupun terdapat perintah mahkamah bahawa resolusi oleh responden kedua ke responden kelima adalah tidak sah, responden kedua ke responden kelima terus cuba menyingkir Peter daripada pengurusan responden pertama. Berikutan percubaan mereka pada kali yang terakhir untuk berbuat demikian, Peter telah memfailkan suatu petisyen penggulungan di bawah s 218(1)(i) Akta Syarikat 1965 ('Akta itu') untuk menggulung responden pertama atas alasan adil dan saksama.

Diputuskan, memerintahkan supaya responden pertama digulung:

(1) *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; [1972] 2 All ER 492; [1972] 2 WLR 1289 hanya menyatakan keadaaan di mana pertimbangan yang saksama akan digunakan dan tidak menyatakan sebarang ujian apabila peruntukan 'adil dan saksama' akan terpakai.

(2) Responden kedua hanya mempunyai kuasa untuk menjual saham Peter di dalam syarikat-syarikat Singapura dan Malaysia dan bukan untuk melabur hasil kutipan jualan dalam syarikat yang diperbadankan untuk tujuan itu dan beliau juga tidak mempunyai kuasa untuk memperbadankan responden pertama dan untuk menguruskannya. Akan tetapi, adalah terlalu lewat sekarang untuk Peter membuat bantahan terhadap cara bagaimana pelaburan beliau dilaburkan semula melalui perbadanan responden pertama dan syarikat keluarga yang lain terutamanya apabila beliau memegang saham di dalam syarikat tersebut.

(3) Memandangkan sifat penubuhan dan perbadanan responden pertama, obligasi anak-anak Kuok Sr sebagai ahli-ahli melampaui obligasi yang diperuntukkan oleh memorandum dan perkara-perkara persatuan. Responden pertama sememangnya suatu persatuan keluarga yang terdiri daripada anak-anak dan cucu lelaki Kuok Sr dan personaliti mereka ini yang menjadikan responden pertama sebuah syarikat di mana perhubungan ahli-ahlinya sama seperti rakan kongsi.

(4) Walaupun 12 tahun telah berlalu semenjak Peter sedar bahawa terdapat luar aturan oleh responden kedua, tidak terdapat kelengahan memandangkan keadaan-keadaan khas kes ini dan situasi Peter. Atas fakta tersendiri kes ini, tidak mungkin bahawa Peter telah memberi persetujuan kepada tindakan responden kedua yang di luar aturan itu.

(5) Terdapat justifikasi untuk mahkamah menggulung responden pertama di bawah peruntukan adil dan saksama di bawah s 218(1)(i) Akta itu kerana:

(i) kepercayaan dan kepercayaan mendasari bersama, yang menjadi asas persatuan, tidak wujud sama sekali;

(ii) keadaan urusan masakini responden pertama tidak mungkin didaya oleh Kuok Sr atau pihak-pihak kepada petisyen ini

apabila mereka bersetuju untuk menggabung wang mereka dan menjadi ahli-ahli responden pertama;

(iii) Peter dan responden kedua ke responden keempat sekarang sudah agak tua kerana Peter sekarang berumur 63 tahun dan beliau tidak sepatutnya dibiarkan supaya menunggu wangnya untuk selama-lamanya. Responden pertama adalah solven, tidak mempunyai pemiutang tetapi tidak pernah mengisytiharkan sebarang dividen; dan

(iv) kesemua pemegang saham, tanpa kekecualian, telah menyuarakan niat mereka supaya responden pertama digulung sejak 1987, tetapi langkah-langkah untuk memenuhi kehendak bersama tidak diambil sehingga sekarang.

(6) Tidak terdapat justifikasi untuk memerintahkan supaya suatu penggulungan sukarela dibuat berbanding dengan suatu penggulungan wajib kerana pertikaian keluarga ini tidak akan diselesaikan jika ianya dibiarkan dalam tangan pemegang saham. Di atas fakta kes ini, adalah adil dan saksama supaya seorang penyelesai yang dilantik oleh mahkamah diperintahkan supaya mengambil alih urusan responden pertama.]

[*Editorial Note*: The respondents have appealed to the Supreme Court vide Civil Appeal No 02–317–94.]

Notes

For cases on the just and equitable winding up of a company, see 3 *Mallal's Digest* (4th Ed) paras 262–266.

Cases referred to

Ebrahimi v Westbourne Galleries Ltd [1973] AC 360; [1972] 2 All ER 492; [1972] 2 WLR 1289 (not folld)
Senson Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326 (refd)
Sin Lee Sang Sawmill Sdn Bhd, Re [1990] 1 MLJ 250 (refd)
Tahansan Sdn Bhd, In the matter of [1984] 1 MLJ 204 (refd)

Legislation referred to

Companies Act 1965 ss 181, 218(1)(i), 243
Companies Act 1948 s 222(f) [Eng & Wales]

Liza Chan (*Peter Yip* with her) (*Peter Yip & Yong*) for the petitioner.
M Nagarajah (*Shook Lin & Bok*) for the respondents.

Cur Adv Vult

Siti Norma Yaakob J: In these four consolidated petitions, the parties who are the shareholders of the four companies sought to be wound up under s 218(1)(i) of the Companies Act 1965 ('the Act'), agree as a matter of convenience to proceed with the first of such petitions filed in D2–28–

187–90 and that orders to be made in this first petition will govern the other petitions as well.

The dispute in D2–28–187–90 is very much a family dispute and it concerns the right to be entitled to enjoy the fruits of investments made by the petitioner, Woodsville Sdn Bhd, with Tien Ik Enterprises Sdn Bhd, the first respondent, the company sought to be wound up.

The petitioner is a nominee company of Peter Kuok Khoon Hwong (Peter), the eldest of seven siblings of Kuok Hock Chin ('Kuok Sr'). The seven siblings are:

(1) Peter Kuok;
(2) Joshua Kuok;
(3) Helen Kuok;
(4) James Kuok;
(5) Andrew Kuok;
(6) Irene Kuok; and
(7) David Kuok.

Thus the second, third and fourth respondents are Peter's brothers and sister whilst the fifth respondent is Peter's nephew, he being the son of Joshua, the second of the seven siblings. James is not cited a party as he had already filed separate proceedings against the first and second respondents in Singapore and Malaysia and he has settled his claims against them. The other sibling, Andrew, has also brought separate proceedings against the first and second respondents for an account of his share in the first respondent and the matter is still pending.

The first respondent was incorporated on 7 March 1978, with an authorized capital of RM2m, divided into two million shares at RM1 each. To date, it has a paid-up capital of RM1m, divided into one million shares of RM1 each. It was incorporated to carry on business as general traders including the buying and selling of all forms of investments. The petitioner who is Peter's investment arm, is a shareholder, so too Parquin Sdn Bhd, K-Crest Sdn Bhd, Milverton Sdn Bhd (the nominee companies of the second, third and fourth respondents, respectively), the fifth respondent and Andrew in equal shares. Up to 1989, Peter was a director but presently the Board is made up of the second to fifth respondents.

The first respondent is one of an array of companies set up in 1978 in Malaysia, Singapore and Hong Kong as the vehicles to further the family fortune. The other companies are:

Malaysia	Year incorporated
(1) Tien Ik Sdn Bhd (TISB)	1973
(2) The first respondent	1978
(3) Tien Ik Credit Sdn Bhd (TICSB)	1978
(4) Giltspur Holdings Sdn Bhd	1978

A These four Malaysian companies form the subject matter of the four consolidated petitions.

Singapore

(5)	Tien Ik Holdings Pte Ltd	1973

B Hong Kong

(6)	K-Rex Holdings Ltd	1978
(7)	K-Rex Insurance Ltd	1978
(8)	K-Rex Enterprises Ltd	1978
C (9)	Giltspur Enterprises Ltd	1978
(10)	Omsby Trading Ltd	1978
(11)	Worldport Trading Ltd	1984
(12)	Giltspur Nominees Ltd	1978

D I shall refer to all these companies as the family companies.

There was also in existence two family trust funds. The first of these, known as the KHC Trust Fund, was set up in 1974 and the primary beneficiaries were Kuok Sr, his wife, children and grandchildren. Under the terms of the trust deed, Unipar Sdn Bhd was appointed the sole trustee E with powers to determine the vesting day and the ultimate beneficiaries. This trust became vested on 30 June 1983, and Peter's 1/6th share as well as the shares of the other siblings were ploughed into the pool fund in 1984, the details of which are discussed further in this judgment.

The other family trust fund was the Peduka Trust set up in Hong F Kong in 1978 to regulate all the proceeds of sale of all the overseas assets belonging to the family of Kuok Sr. This trust became vested in 1984 and Peter became entitled to a 1/6th share.

Besides the two trust funds, there were two other family companies set up by Kuok Sr and members of his immediate family, these being:

G (1) Kuok (Singapore) Pte Ltd, a company incorporated in Singapore ('the Singapore company'); and

(2) Kuok Brothers Sdn Bhd, a company incorporated in Malaysia ('the Malaysian company').

All the seven siblings hold a substantial amount of the shares in both the H Singapore and Malaysian companies.

In 1977, following differences between Kuok Sr and his brother, Kuok Sr and members of his family withdrew from the Singapore and Malaysian companies and sold their holdings in both the companies. For this purpose, Peter appointed two of the family companies, TISB and Tien I Ik Holdings Pte Ltd, as his agents to sell his shares.

Kuok Sr then got his children to pool the proceeds of sale of all their holdings in the Singapore and Malaysian companies into a common pool fund for the purpose of reinvesting their moneys jointly. This pool fund

was set up in January 1978 and over the years, this pool fund swelled, as whatever moneys were due to the siblings were paid into the pool fund for further reinvestment. Kuok Sr relied and depended on the second respondent, his youngest son and a chartered accountant, to manage the pool fund and this triggered the start of the many differences amongst the siblings.

To begin with, James fell out with Kuok Sr and the second respondent in August 1978 when he questioned the second respondent about the investments he was making from the pool fund. Dissatisfied with the way the second respondent was managing the pool fund, he opted to withdraw on condition the second respondent supplied him with an account of all the investments the second respndent had made up to 16 September 1978.

The second respondent produced such an account and handed it together with a declaration deed for James to sign. In essence, the deed required him to relinquish all his claims against other members of the family and the family companies in return for approximately RM5m due to him from the pool fund.

At about the same time too, the second respondent produced a progress report dated 7 August 1978, setting out the investments he had made with the pool fund through the family companies and circulated it to his brothers and sisters.

James refused to accept the accounts prepared by the second respondent nor sign the declaration deed and the upshot of this was that he instituted legal proceedings in Singapore and Malaysia to enforce his entitlement of his share in the pool fund notwithstanding the deployment of the pool fund into the family companies. Both suits have been settled in 1984 and James was paid approximately RM3.8m.

Kuok Sr died on 3 November 1979, and this further widened the differences of the siblings particularly over the second respondent's management of the pool fund.

Andrew and the second respondent fell out over certain investments in Hong Kong resulting in Andrew leaving the Hong Kong companies which he had been managing until then. On 25 September 1980, he indicated his desire to withdraw from the pool fund, effective from 31 August 1980, and he requested the second respondent for an account to be taken of his entitlement.

When the second respondent failed to do so, Andrew sought the good offices of the family solicitor in Singapore in May 1981 to intercede on his behalf. Despite attempts made by the family solicitor and other members of his family, the second respondent did not produce any accounts. Finally, on 13 February 1986, Andrew sued Peter, the second to fourth respondents, his mother as the administratrix of the estate of Kuok Sr and Unipar Sdn Bhd, trustee of the KHC Trust Fund, in Kuala Lumpur Civil Suit No 22–28–86 seeking a declaration that the pool fund ended on 31 August 1980, and the second respondent account for his share of the pool fund. This suit is still pending.

A The second respondent has not denied that the first respondent and the other family companies are vehicles for investing the pool fund and that he actively managed the pool fund during his father's lifetime and after his father's death, until 3 December 1986, when he indicated his intention to relinquish all his executive functions in the first respondent and the other family companies, citing ill-health and the breakdown of his B marriage as the reasons for his withdrawal.

From 1987 until 1989, Peter took over the reins of managing the first respondent and the other family companies and it was in 1987 that the siblings agreed that the pool fund be distributed and that they be paid the capital of all investments made with the pool fund in the family companies C of which they are shareholders. As this entails the winding up of some of the family companies concerned and a drawing up of accounts of the pool fund and the family companies, Peter engaged the services of two accountants to look into the accounts of the operations of the family companies in Malaysia and Hong Kong. From their investigations, Peter discovered that the second respondent had channelled large sums of the D pool fund to a number of overseas corporations, principally Bimelec Investment Corp incorporated in Panama on 18 October 1977, as the holding company for the family companies incorporated in Hong Kong.

Peter then appointed a firm of accountants, Deliotte, Haskins & Sells in Hong Kong ('DHS') to audit Bimelec's accounts and the family's Hong E Kong companies into which Bimelec had invested the pool fund. DHS was only able to produce a draft account, PK20, and when it was submitted to the second respondent for his review and comments, he only offered general comments which were insufficient to unravel the investments he had made during the past ten years.

F Peter also discovered that two of the family companies based in Hong Kong, namely K-Rex Enterprise Ltd and Worldport Trading Ltd, had extended large credit facilities to a group of companies belonging to one William Wong without sufficient securities. Peter then took upon himself to inquire into these lendings as the accounts were all overdue and G the result was that on 25 February 1989, he was removed as a director of the two companies.

Peter also discovered that the second respondent had used the pool fund to extend a RM1.4m loan to Bournemouth Sdn Bhd. A civil suit was filed in Kuala Lumpur in 1983 to enforce repayment but to date, Bournemouth has not paid up.

H Following Peter's persistent probings, the second to fifth respondents, as the majority shareholders and directors of the first respondent, passed a number of resolutions, all aimed at excluding Peter from the management of the first respondent as well as managing the other family companies by removing him as the chairman and executive director of the first respondent I as well as the director of the other family companies.

Following the passing of the resolutions, the second to fifth respondents filed Originating Summons No D1-24-41-89 against Peter on 23 February 1989, seeking restraining orders against him so as to

exclude him from managing the first respondent. On 27 February 1989, they obtained an ex parte interim injunction but on 6 March 1989, the ex parte injunction was suspended pending Peter's application to have it set aside. On the same day, Peter and the petitioner obtained an order in separate proceedings filed by Peter and the petitioner, restraining the respondents from effecting the resolutions and excluding them from participating in the affairs of the first respondent. In those proceedings, Petition No D1–26–9–89, Peter and the petitioner had also sought relief under s 181 of the Act on the grounds that the respondents' actions were oppressive. This petition was subsequently withdrawn in October 1989 with liberty to file afresh.

The second to fifth respondents, through their nominee companies and TISB, had also filed another Originating Summons No D1–24–121–89, against Peter seeking a declaration that Peter had vacated the office of director of the first respondent and TISB with effect from 23 March 1989. Their application for an interim injunction to restrain Peter from holding out as a director of the first respondent and TISB, together with Peter's application to set aside the interim injunction obtained by the respondents in Originating Summons No D1–24–41–89, were heard together and on 5 September 1989, Anuar J dismissed the respondents' application in Originating Summons No 24–121–89 and allowed Peter's application in Originating Summons No 24–41–89 on the ground that the resolutions were invalid.

Despite this court order, the second to fifth respondents, through the exercise of their majority votes, appointed an executive committee, the members of which are made up of themselves, to take over the functions of the Board of the first respondent and the other three family companies sought to be wound up. It was following this last attempt to oust him from the affairs of the first respondent that Peter filed this petition through his nominee company, seeking to have the first respondent wound up under s 218(1)(i) of the Act.

Peter contends:

(1) that the first respondent is a domestic company formed on the basis of personal relationship involving personal trust and mutual confidence amongst brothers and sisters. The association is in the nature of a quasi-partnership; and

(2) that the underlying trust and mutual confidence have deteriorated over the years and now cease to exist due primarily to the conduct of the second respondent.

For these reasons, it is just and equitable that the first respondent be wound up, particularly when his brothers, sisters and nephew had indicated as long ago as 1987 that their investments of the pool fund in the first respondent be distributed to them in the proportion of their shareholdings.

Whilst the second to fifth respondents are not opposed to the idea of winding up the first respondent, they nonetheless prefer a voluntary winding up as opposed to a compulsory one and in his affidavit in reply to the

petition, the second respondent, whilst not denying the various averments in the petition, nonetheless gives his version of what had transpired when he was actively managing the family companies from 1978–1986 and during the two years from 1987–1989 when Peter took over from him. The third to fifth respondents have not filed any affidavit and this only means that they knew no more of what was going on in the management of the first respondent although they featured prominently during the years 1987–1989 when they exercised their voting rights to have Peter excluded from managing the first respondent. In any event, the second respondent has affirmed that his affidavit in reply is also made on behalf of the other respondents as well.

I summarize the sum total of the second respondent's affidavit to be as follows:

(1) That the first respondent is not a domestic company financed by a partnership fund known as the pool fund.

(2) That he had the authority to invest the pool fund and manage the first respondent.

(3) That he had produced accounts to the satisfaction of all the family members.

(4) That as a director of the first respondent as well as being an advocate and solicitor, Peter should have, with due diligence, inquired into the financial status of the first respondent and if there had been irregularities, he should have voiced the same then. Delay and the motive of instituting these proceedings would work against the petitioner.

(5) That during the two years when Peter was the executive chairman of the first respondent, he, Peter, through the appointments of his nominee directors on the Board, tried to take full control of the first respondent and it was to prevent this happening that the second to fifth respondents passed a number of resolutions which became the subject matter of a number of suits filed by the respondents against Peter and vice versa in 1989.

(6) That there is no loss of trust or confidence amongst the shareholders of the first respondent but that the shareholders have lost faith in Peter's ability to manage the affairs of the first respondent.

(7) That although the other shareholders have expressed their desire for the return of their capital, this can be achieved through a voluntary winding up of the first respondent as opposed to a compulsory winding up by an order of court.

Despite obtaining a court order and giving notices of their intention to cross-examine each other on the affidavits filed by the petitioner and the respondents, the parties however decided against doing so and were content to rely on their respective affidavits to support or oppose the petition.

From the averments of the affidavits filed by both the petitioner and the respondents, it becomes necessary to determine, firstly, the true nature

of the first respondent, the purpose of its incorporation and its composition as these factors can indicate the underlying rights and obligations which the members have towards each other.

In this instance, the petitioner contends that the first respondent is a company where the relationship between the members is akin to partners, ie a quasi-partnership corporation, a contention which is strongly opposed by the respondents on the grounds that the first respondent does not meet with all the three criteria enunciated in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; [1972] 2 All ER 492; [1972] 2 WLR 1289.

In *Ebrahimi*'s case, the application of the 'just and equitable' provision of s 222(f) of the English Companies Act 1948, which is in pari materia with our s 218(1)(i), was discussed to be as follows ([1973] AC 360 at p 379; [1972] 2 All ER 492 at p 500; [1972] 2 WLR 1289 at p 1298):

> The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations: considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.
>
> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence — this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company — so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

It is these three elements appearing in the judgment of Lord Wilberforce which Mr Nagarajah, counsel for the respondents, submits should be complied with by the first respondent before it can be regarded as a company which can be imbued with the characteristics of a quasi-partnership association. I cannot accept this contention as the judgment does not say

A that. It merely sets out the circumstances under which the equitable considerations can be adopted and by way of an illustration, the three elements were stated as examples of circumstances where the just and equitable provision can apply. I emphasize that *Ebrahimi*'s case does not lay down any test when the 'just and equitable' provision can be applied. On the contrary, Lord Wilberforce has warned against limiting the meaning B of the clause 'just and equitable' and that it is wrong to create categories or headings under which cases must be brought if the clause is to apply.

I now come to the facts of this case.

It is not disputed that the first respondent was incorporated in 1978 at about the same time the pool fund was established in January of the C same year. It was incorporated during Kuok Sr's lifetime and being one of the family companies, it can only mean that the first respondent was intended to be the vehicle for which the family fortune was to be further enhanced.

In 1978, the source of that family fortune came from the pool fund D which was set up by Kuok Sr for the benefit of his four sons, two daughters and grandson. There must have been some understanding as to the management of the pool fund and in this instance, the respondents have not denied the petitioner's contention that the common understanding between them was that Kuok Sr would manage the pool fund with the E assistance of his children during his lifetime and upon his death or retirement, all his children would have an equal say in the management and eventual disposal of the pool fund.

Initially, the pool fund came from the proceeds of sale of the family's shareholdings in the Singapore and Malaysian companies. In the case of Peter's shares in the two companies, he had authorized his agents, TISB F and Tien Ik Holdings Pte Ltd, to sell his shares. As the second respondent had the control of TISB and Tien Ik Holdings Pte Ltd, it is his contention that he had not only the authority to sell Peter's shares in the Singapore and Malaysian companies but the authority to invest the proceeds of sale in companies set up for that purpose and it is this authority to invest which G empowers him to incorporate the first respondent and manage it as well.

I cannot accept this contention, as from the contemporaneous document, this being Peter's letter of authorization dated 8 January 1978, it merely empowers TISB and Tien Ik Holdings Pte Ltd to sell the shares on behalf of Peter, but is silent regarding the investment of the proceeds of H sale. Perhaps the power to invest may well have come from Kuok Sr himself, as it was following the sales of the family's holdings in the Singapore and Malaysian companies that the pool fund was created and it is now too late for Peter to object to the manner in which his investments had been reinvested further through the formation of the first respondent and the other family companies particularly when he holds shares in those I companies.

From the very beginning to this day, the members of the first respondent, who provided the capital for the company from the pool fund, were confined to the children of Kuok Sr or their nominees and in that

sense it is a domestic company. Although they subscribe to the memorandum and articles of association, I consider that from the nature of the formation and set up of the first respondent, their obligations as members go beyond that laid down by the memorandum and articles of association. The first respondent is definitely a family association made up by the children and grandson of Kuok Sr and it is their personalities as such that single out the first respondent to be a company where the members' relationship is akin to that of partners.

The respondents have also argued that the just and equitable provision is not applicable to the facts of this case as Peter had taken 12 years from the time he was aware of the irregularities in 1978 until this petition is filed in 1990, to seek redress. Delay, they contend, defeats his claims, so too the motive behind the presentation of this petition.

It must be remembered that it was only in 1987 that Peter became active in the affairs of the first respondent. It is also true that prior to that, he was already made a director of the first respondent and from the proceedings filed by James and Andrew, he was aware of the irregularities created by the second respondent. Under these circumstances, it must also be appreciated that all the parties are related to each other by blood and there is, therefore, that natural tendency that family matters be settled amicably amongst them by way of discussions or through the intermediary of a trusted family member. It is this blood relationship I consider to be the deciding factor of the reluctance to have family matters publicly discussed and determined by way of a court action. In any event, prior to 1987, Peter had distanced himself by setting up his practice in Tawau and eventually, when he took up the reins of management in 1987 and saw the extent of the irregularities, he had in 1989, presented Petition No D2–26–9–89 seeking, inter alia, relief under s 181 of the Act. Given the special circumstances of this case and the position that Peter was placed in, I do not consider that the delay that occurred can prejudice his right to have this petition presented and determined. On the peculiar facts of this case, is no question of Peter having consented to the second respondent's irregular conduct and it is quite unlike the situation created by the parties in *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326 and in *Re Sin Lee Sang Sawmill Sdn Bhd* [1990] 1 MLJ 250.

As for questioning Peter's motive in presenting this petition, he, Peter, cannot be equated to the position of the creditor seeking the winding up of a company to enforce a debt due from the company. In this case, the first respondent is primarily an investment company which is an accepted fact and I see nothing unreasonable or inequitable for Peter to want a return of his investments.

Just as the second respondent questions Peter's inequitable conduct, the second respondent's conduct is also not above reproach. During the period 1978–1986, as the member who ran the first respondent single handedly, he was accountable to all the other members for the investments he had made from the pool fund. He only did so in 1985, in respect of the investments he made in 1978, but the accounts he produced was only in

respect of one month, January 1978. There is no statement of accounts from 1979 until 1986 although he had also exhibited in his affidavit all the administrative decisions he had taken in 1978 but not the period after that.

Then, finally, when he relinquished control of the first respondent to Peter, the second respondent, together with the third to fifth respondent, had passed a number of resolutions that became the subject matter of various suits brought by all the members against each other in 1989.

In the light of the scenario that I have painted, is there any justification for this court to wind up the first respondent under the just and equitable provision of s 218(1)(i) of the Act?

I answer this in the affirmative for the following reasons.

(1) The mutual trust and underlying confidence, which formed the basis of the association, have ceased to exist altogether. This is evidenced by James and Andrew pulling out of the pool fund and the presence of the many legal actions which the other members of the family had filed against each other in 1989 over the same subject matter, ie the return of their capital in the pool fund through the investments made by the second respondent in companies like the first respondent and the other family companies established for that very purpose.

(2) The present state of affairs of the first respondent could not possibly have been contemplated by Kuok Sr or the parties in this petition when they agreed to pool their resources and become members of the first respondent.

(3) With the exception of the fifth respondent, age is running against Peter and the second to fourth respondents. Peter is now 63 and he should not be allowed to wait for his money forever. The first respondent is solvent. It has no creditors but it has never declared any dividends.

(4) All the shareholders, without exception, have declared their intention to have the first respondent wound up from as long ago as March 1987, but no steps have been taken until now to fulfil that common intention.

In this instance, the second to fifth respondents prefer a voluntary winding up as opposed to a compulsory one but on the peculiar facts of this case, I see no justification in so ordering as I envisage that this family dispute will not reach any finality if left in the hands of the shareholders. In all probability, the same situation would be re-created as that which existed in 1989 when the second to fifth respondents, in the exercise of their majority votes, would control the liquidator to the exclusion of the petitioner if the first respondent is voluntarily wound up.

On the facts of this case, it was only just and equitable that a court-appointed liquidator be directed to take over the affairs of the first respondent. Since consents have already been obtained from two persons, I make the following orders as regards this petition:

(1) that the first respondent be wound up under s 218(1)(i) of the Act;
(2) that Mustapha Mohamed and Gong Wee Ning of Messrs Coopers & Lybrand be appointed liquidators of the first respondent; and
(3) that the costs of this petition be paid out of the assets of the first respondent.

The respondents have applied for leave to appeal to the Supreme Court as well as a stay of execution of the winding-up order. I have allowed leave to appeal but not a stay on the grounds that the respondents had failed to provide me with sufficient proof under s 243 of the Act that the winding up ought to be stayed. Moreover, as a matter of practice, a stay is never granted. (See *In the Matter of Tahansan Sdn Bhd* [1984] 1 MLJ 204.)

Order accordingly.

Reported by Jeanne Tan